IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

WALTER A. WINSHALL, in his capacity as the Stockholders' Representative for former Harmonix Stockholders,	)	
	)	C.A. No.: N15C-06-137 EMD CCLD
Plaintiff,	)	
v.	)	
VIACOM INTERNATIONAL, INC., a Delaware Corporation,	)	
Defendant.	)	

Submitted: November 23, 2015
Decided: February 29, 2016

Upon Consideration of
Defendant Viacom International, Inc.'s Motion to Dismiss
DENIED

James P. McEvilly, III, Esquire, Shlansky Law Group, LLP, Wilmington, Delaware, Colin R. Hagan, Esquire, David J. Shlansky, Esquire, Shlansky Law Group, LLP, Chelsea, Massachusetts, *Attorneys for Plaintiff Walter A. Winshall, in his capacity as the Stockholders' Representative for former Harmonix Stockholders.*

Stephen P. Lamb, Esquire, Laura B. Braunsberg, Esquire, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Wilmington, Delaware, Robert A. Atkins, Esquire, Steven C. Herzog, Esquire, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, New York, *Attorneys for Defendant Viacom International, Inc.*

DAVIS, J.

I. INTRODUCTION

This is a civil case action assigned to the Complex Commercial Litigation Division of the Court. The action arises out of a merger of Harmonix Music Systems ("Harmonix") and Defendant Viacom International, Inc. ("Viacom") in 2006. Plaintiff Walter A. Winshall, the representative of the former stockholders of Harmonix, brought this action in June 2015. Mr. Winshall raises three breach of contract claims and one malicious prosecution claim. Viacom argues that these claims are barred by: (i) the doctrine of *res judicata* and (ii) Delaware's statute of limitations. Viacom also argues that Mr. Winshall fails to state a claim upon which relief can be granted.

Mr. Winshall filed the Verified Civil Complaint on June 14, 2015. Viacom filed the Defendant Viacom International, Inc.'s Motion to Dismiss and the Opening Brief in Support of Defendant Viacom International, Inc.'s Motion to Dismiss (collectively, the "Motion") on August 28, 2015. Mr. Winshall filed the Plaintiff's Answering Brief in Opposition to Defendant's Motion to Dismiss (the "Answer") on October 12, 2015. Viacom filed the Reply Brief in Further Support of Defendant Viacom International Inc.'s Motion to Dismiss (the "Reply") on November 6, 2015. On November 23, 2015, the Court held a hearing on the Motion, the Answer, and the Reply. At the conclusion of the hearing, the Court took the matter under advisement.

This is the Court's decision on the Motion. For the reasons set forth below, the Court will **DENY** the Motion.

II. RELEVANT FACTS

A. THE VIACOM AND HARMONIX MERGER

Viacom is a global entertainment company with television and film operations.[1] Viacom is a Delaware corporation with its principal place of business in New York.[2] Harmonix was a video game company that merged with Viacom on September 20, 2006 under a merger agreement (the "Merger Agreement").[3] Mr. Winshall is a former shareholder in Harmonix and is

[1] Verified Civil Complaint ¶ 22.
[2] *Id.*
[3] *Id.* ¶ 4.

the Stockholders' Representative for former Harmonix stockholders (the "Harmonix Stockholders") pursuant to the terms of the Merger Agreement.[4]

Under the Merger Agreement, Viacom would pay earn-out payments (the "Earn-Out Payments") for the years 2007 and 2008 to the Harmonix Stockholders.[5] The Merger Agreement provided how the Earn-Out Payments were to be determined and how disputes would be settled. Section 2.4 provided:

> (a) Determination of 2007 Earn-Out Payment Amount. No later than fifteen (15) days after the preparation or receipt by the Surviving Corporation and Parent of all information necessary to calculate the 2007 Earn-Out Payment Amount, Parent shall prepare and deliver to the Stockholders' Representative a statement (the "2007 Earn-Out Statement") setting forth the calculation of the 2007 Earn-Out Payment Amount, together with information necessary to calculate the 2007 Earn-Out Payment Amount. Subject to Section 10.8(a), Parent agrees to promptly provide the Stockholders' Representative with reasonable access to all work papers and supporting documentation relating to the 2007 Earn-Out Statement and such other documentation, in each case as the Stockholders'' Representative may reasonably request in order to assess the accuracy of the 2007 Earn-Out Statement. If the Stockholders' Representative disagrees with the calculation of the 2007 Earn-Out Payment Amount, it must deliver to Parent, within twenty (20) days after the date the Stockholders' Representative received the 2007 Earn-Out Statement, a written description of each such disagreement (the "2007 Summary of Issues"). In connection with any dispute resolution regarding the 2007 Earn-Out Payment Amount, the Stockholders' Representative will not dispute any additional issues or amounts other than the 2007 Summary of Issues submitted to Parent within the twenty (20) day-period described above. If no such 2007 Summary of Issues is submitted within such twenty (20) day-period, then Parent's calculation as set forth on the 2007 Earn-Out Statement shall be deemed final. If the Stockholders' Representative has determined that it agrees with the calculation prior to the expiration of the twenty (20) day-period described above, the Stockholders' Representative may provide Parent with a written statement to this effect in order to initiate the payments pursuant to Section 2.4(d) of this Agreement.
>
> (b) Determination of 2008 Earn-Out Payment Amount. No later than fifteen (15) days after the preparation or receipt by the Surviving Corporation and Parent of all information necessary to calculate the 2008 Earn-Out Payment Amount, Parent shall prepare and deliver to the Stockholders' Representative a statement (the "2008 Earn-Out Statement") setting forth the calculation of the

[4] *Id.* ¶ 21.

[5] *Id.*, Exhibit A, Merger Agreement § 2.4. Exhibit A to the Verified Civil Complaint will be cited to as "Merger Agreement § __."

2008 Earn-Out Payment Amount, together with information necessary to calculate the 2008 Earn-Out Payment Amount. Subject to Section 10.8(a), Parent agrees to promptly provide the Stockholders' Representative with reasonable access to all work papers and supporting documentation relating to the 2008 Earn-Out Statement and such other documentation, in each case as the Stockholders' Representative may reasonably request in order to assess the accuracy of the 2008 Earn-Out Statement. If the Stockholders' Representative disagrees with the calculation of the 2008 Earn-Out Payment Amount, it must deliver to Parent, within twenty (20) days after the date the Stockholders' Representative received the 2008 Earn-Out Statement, a written description of each such disagreement (the "2008 Summary of Issues"; the 2007 Summary of Issues and the 2008 Summary of Issues are each referred to herein from time to time as a "Summary of Issues"). In connection with any dispute resolution regarding the 2008 Earn-Out Payment Amount, the Stockholders'' Representative will not dispute any additional issues or amounts other than the 2008 Summary of Issues submitted to Parent within the twenty (20) day-period described above. If no such Summary of Issues is submitted within such twenty (20) day-period, then Parent's calculation as set forth on the 2008 Earn-Out Statement shall be deemed final. If the Stockholders' Representative has determined that it agrees with the calculation prior to the expiration of the twenty (20) day-period described above, the Stockholders' Representative may provide Parent with a written statement to this effect in order to initiate the payments pursuant to Section 2.4(d) of this Agreement.

(c) Resolution of Earn-Out Disputes. The Stockholders' Representative and Parent will negotiate in good faith to resolve the issues and amounts set forth in any Summary of Issues. If, after a period (the "Resolution Period") of twenty (20) days following the date on which such Summary of Issues is delivered to Parent, the Stockholders' Representative and Parent have not resolved each item in such Summary of Issues, then either the Stockholders' Representative or Parent will be entitled to submit the unresolved items in such Summary of Issues (the "Earn-Out Disagreements") to the Resolution Accountants, so long as such submitting Party provides written notice of such submission to the non-submitting party. The scope of the Resolution Accountants engagement (which shall not be an audit) shall be limited to the resolution of the Earn-Out Disagreements, and the recalculation of the 2007 Earn-Out Payment Amount or 2008 Earn-Out Payment Amount, as the case may be, in light of such resolution, and such firm shall be deemed to be acting as experts and not as arbitrators. The Resolution Accountants will resolve the Earn-Out Disagreements and render a written report on the resolved Earn-Out Disagreements within ten (10) Business Days after the date on which they are engaged or as soon thereafter as possible. The resolution of the dispute by the Resolution Accountants will be a final, binding and conclusive resolution of the parties' dispute, shall be non-appealable, and shall not be subject to further review. The costs, fees and expenses of the Resolution Accountants will be allocated by the Resolution Accountants between Parent and the Stockholders' Representative in the same proportion that the aggregate amount of such resolved disputed items so submitted to the Resolution Accountants that is unsuccessfully disputed by each such party (as finally determined by the Resolution Accountants) bears to the total amount of such resolved disputed items so submitted.

(d) Payment of Earn-Out Payment Amounts. Promptly and in any event within five (5) days following the final determination of the 2007 Earn-Out Payment Amount or the 2008 Earn-Out Payment Amount, as applicable (and if any), Parent shall cause the Surviving Corporation to pay (in each case without any interest thereon) to (i) BAS the 2007 Advisor Earn-Out Fee or the 2008 Advisor Earn-Out Fee, as applicable, (ii) the Paying Agent (or a successor reasonably satisfactory to Parent and the Stockholders' Representative) for further payment to the holders of Capital Stock and the Warrant Holders an amount sufficient to pay the aggregate portion of the 2007 Earn-Out Payment Amount or 2008 Earn-Out Payment Amount, as applicable, payable to the holders of Capital Stock (other than shares of Restricted Stock) pursuant to Section 2.1 (c) and Section 2.2(b), as applicable, and (iii) each holder of shares of Restricted Stock and each Optionholder such Person's portion of the 2007 Earn-Out Payment Amount or 2008 Earn-Out Payment Amount, as applicable, as provided in Section 2.1(c) and Section 2.2(a), as applicable. Any amounts payable pursuant to this Section 2.4(d) shall be subject to reduction as required by applicable federal and state Tax withholding Laws, rules and regulations.

(e) Final Earn-Out Payment Amount Binding on Parties. The determination of the 2007 Earn-Out Payment Amount or the 2008 Earn-Out Payment Amount, as applicable (and if any), in accordance with the foregoing provisions of this Section 2.4 shall be final and binding on all parties, and no such party shall have the right to bring any claim disputing such final determination, in the absence of fraud or manifest error.[6]

The Merger Agreement also contained an indemnification clause at Section 8.6, which provided:

(a) Indemnification. Subject to the limitations set forth in this Article VIII, from and after the Effective Time, each of Parent and MergerCo, jointly and severally, shall indemnify, defend and hold harmless each Merger Consideration Recipient against any and all Losses actually incurred or suffered by any such Merger Consideration Recipient as a result of:

(i) the breach of any representation or warranty of Parent or MergerCo set forth in this Agreement or in any Ancillary Document; and

(ii) the breach of any covenant or agreement of Parent or MergerCo contained in this Agreement or in any Ancillary Document.

(b) Certain Limitations. Parent and MergerCo shall not be obligated to indemnify any Merger Consideration Recipient pursuant to Section 8.6(a) to the extent the aggregate amount of all indemnifiable Losses exceeds the aggregate unpaid amount of the Merger Consideration then payable.[7]

---

[6] Merger Agreement § 2.4.
[7] *Id.* § 8.6.

“Losses” are defined as:

> “Losses” of a Person means any and all losses, liabilities, damages, claims, awards, judgments, diminution in value, Taxes, fees, costs and expenses (including reasonable attorneys’ fees and expenses, expenses of investigation, defense, prosecution and settlement of claims (including any claims under Article VIII hereof), court costs or enforcement of the provisions of this Agreement) suffered or incurred by such Person, plus any interest that may accrue on the foregoing.[8]

On September 16, 2008, Viacom paid $149,770,149.00 to the Harmonix Stockholders toward the 2007 Earn-Out Payment (the “Preliminary 2007 Earn-Out Payment”).[9] Viacom’s CEO wrote to the Harmonix Stockholders that “Harmonix exceeded the 2007 target” so additional payments may be forthcoming.[10] When Viacom made the Preliminary 2007 Earn-Out Payment, Viacom had not given the Harmonic Stockholders a final report calculating the 2007 Earn-Out Payment (the “2007 Earn-Out Statement”).[11]

Mr. Winshall requested a copy of the final 2007 Earn-Out Statement from Viacom multiple times between September 16, 2008 and January 4, 2010.[12] Viacom told Mr. Winshall that Viacom could not yet prepare the final 2007 and 2008 Earn-Out Statements.[13] According to Viacom, Viacom was unable to prepare the final Earn-Out Statements partly due to litigation brought against Harmonix and Viacom in the Eastern District of Texas and the District of Massachusetts (“IP Litigation”).[14] The IP Litigation related to certain Harmonix intellectual property acquired by Viacom in the Merger Agreement.[15] Mr. Winshall alleges that Viacom was using the IP Litigation as an excuse to fraudulently conceal the fact that Viacom did have the information to prepare the 2007 Earn-Out Statement and a similar report for 2008 (the “2008

---

[8] *Id.* § 10.7.
[9] Verified Civil Complaint ¶ 37.
[10] *Id.* ¶ 38.
[11] *Id.* ¶ 43.
[12] *Id.* ¶ 42.
[13] *Id.* ¶ 43.
[14] *Id.*
[15] *Id.*

Earn-Out Statement").[16] Mr. Winshall also alleges that Viacom had all of the information it needed to prepare the 2007 and 2008 Earn-Out Statements because Viacom used the relevant information to file its 2007 Form 10-Q with the Securities and Exchange Commission (the "SEC") on May 2, 2008 and its 2008 Form 10-Q on April 20, 2009.[17]

Viacom gave Mr. Winshall the final 2007 Earn-Out Statement with the 2007 Earn-Out Payment calculation on January 4, 2010.[18] Viacom gave the 2008 Earn-Out Statement with the 2008 Earn-Out Payment calculation on March 26, 2010.[19] Mr. Winshall disagreed with the calculations and challenged both the 2007 and 2008 Earn-Out Payments within the resolution period as set out in § 8.6 of the Merger Agreement.[20]

Under the Merger Agreement, Mr. Winshall could make reasonable requests of Viacom for documents that would enable Mr. Winshall to assess the accuracy of the Earn-Out Statements.[21] Mr. Winshall alleges that Viacom refused to produce documents including the documents Viacom had provided to its own auditors – Harmonix's year-end balance sheets and trial balances, Harmonix's annual financial statements and general ledgers, Viacom's memos discussing accounting for items in the Earn-Out Statements, and records from its distributor.[22]

The Merger Agreement further provided that, if Viacom and Harmonix disagreed on the calculations, Viacom and Harmonix could select neutral accountants (the "Resolution Accountants") to determine the 2007 and 2008 Earn-Out Payment amounts.[23] The Merger Agreement pre-selected a firm, but that firm declined to serve as the Resolution Accountants on

[16] *Id.* ¶¶ 43-44, 83.
[17] *Id.* ¶ 44.
[18] *Id.* ¶ 45.
[19] *Id.* ¶ 46.
[20] *Id.* ¶¶ 48-49.
[21] Merger Agreement § 2.4(a-b).
[22] Verified Civil Complaint ¶¶ 52-54.
[23] Merger Agreement § 2.4(c).

April 6, 2010.[24] Viacom and Harmonix had to agree on another firm to use.[25] Mr. Winshall alleges that Viacom delayed the selection and engagement of the Resolution Accountants.[26] Mr. Winshall contends that: (i) Viacom first selected a firm that could not serve as Resolution Accountants because the firm was the auditor of Viacom's controlling shareholder;[27] (ii) Viacom and Mr. Winshall then interviewed two other firms in May 2010,[28] at which time Mr. Winshall told Viacom that Viacom could select either one, and Viacom selected a firm on June 29, 2010 after weeks of negotiations, but then Viacom changed its mind on June 30, 2010;[29] and, (iii) after numerous subsequent requests from Mr. Winshall, Viacom agreed to use one of the firms on September 15, 2010.[30] Mr. Winshall alleges that to further delay the resolution of the Earn-Out Payments, Viacom then refused to sign an engagement letter with the firm and tried to insert terms into the engagement letter that would change the terms of the Earn-Out Payments in the Merger Agreement.[31]

On December 2, 2010, Mr. Winshall filed a complaint in the Delaware Court of Chancery to compel the retention of the Resolution Accountants. After that suit had been filed, on December 8, 2010, Viacom agreed to retain the Resolution Accountants.[32] Viacom and Mr. Winshall agreed that the Resolution Accountants would only decide certain disputed issues.[33] As discussed below, Mr. Winshall filed Case 6074 in the Court of Chancery to resolve the rest of the issues.[34]

[24] *Id.* § 2.3(b); Verified Civil Complaint ¶ 55.
[25] Verified Civil Complaint ¶¶ 56-60.
[26] *Id.* ¶ 56.
[27] *Id.* ¶ 57.
[28] *Id.* ¶ 58.
[29] *Id.* ¶ 59.
[30] *Id.* ¶ 60.
[31] *Id.* ¶¶ 61-67.
[32] *Id.* ¶ 68.
[33] *Id.* ¶ 67.
[34] *Id.* ¶ 72.

The Resolution Accountants issued their written determination (the "Determination of the Resolution Accountants") on December 19, 2011.[35] The Resolution Accountants found that the 2007 Earn-Out Payment was $234,130,148.00.[36] This amount was $84,360,048.00 more than the Preliminary 2007 Earn-Out Payment.[37] The Resolution Accountants also found that the 2008 Earn-Out Payment was $298,813,095.00.[38]

Mr. Winshall alleges that Viacom tried to bully the Harmonix Stockholders and to obstruct the Resolution Accountants.[39] After Viacom filed Chancery Court Case 6874, as discussed below, Viacom told Mr. Winshall that Viacom would tell the former Harmonix Stockholders to set aside funds to repay the Preliminary 2007 Earn-Out Payment.[40] Mr. Winshall alleges that Viacom did this to pressure Mr. Winshall into settling.[41] Mr. Winshall also alleges that Viacom tried to pressure Mr. Winshall into settling by telling him that there would be adverse tax consequences for the Harmonix Stockholders if the 2008 Earn-Out Payments were delayed.[42] As for the Resolution Accountants, Viacom requested a declaratory judgment that the Determination of the Resolution Accountants was unenforceable in Case 7149.[43]

B. CHANCERY COURT CASES

There were three lawsuits (the "Chancery Court Actions") in the Chancery Court among Viacom, Harmonix, Mr. Winshall, and the Harmonix Shareholders: Case 6074, Case 6874, and Case 7149.

---

[35] *Id.* ¶ 76.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* ¶¶ 72-88.
[40] *Id.* ¶ 75.
[41] *Id.*
[42] *Id.* ¶ 88.
[43] *Id.* ¶ 78.

The Harmonix Stockholders filed Case 6074 on December 15, 2010 against Viacom and Harmonix.[44] Case 6074 involved three claims for relief.[45] First, the Harmonix Stockholders alleged that Viacom breached the implied covenant of good faith and fair dealing for Viacom's renegotiation of distribution fees with Electronic Arts, Inc. ("6074 Count 1").[46] The Harmonix Stockholders also requested a declaratory judgment that Viacom has no claim for indemnification for four patent infringement lawsuits involving Harmonix ("6074 Count 2").[47] Finally, the Harmonix Stockholders claimed Viacom breached the Merger Agreement by refusing to release escrow funds set up by the Merger Agreement on the basis of the pending patent suits("6074 Count 3").[48] The Chancery Court dismissed 6074 Count 1 and granted summary judgment for 6074 Count 2 and 6074 Count 3.[49]

Viacom filed Case 6874 against the Harmonix Stockholders on September 16, 2011.[50] Viacom sought the immediate return of the Preliminary 2007 Earn-Out Payment.[51] The Harmonix Stockholders asserted counterclaims, including a counterclaim that Viacom breached the Merger Agreement by failing to pay the amount of the 2007 Earn-Out Payments.[52] The Chancery Court dismissed Viacom's claim with prejudice. In addition, the Chancery Court dismissed the counterclaims without prejudice because the Harmonix Stockholders had already raised the same claims in another Chancery Court Action, Case 7149.[53]

---

[44] *Id.* ¶ 69.
[45] *Id.* ¶ 70.
[46] Opening Brief in Support of Defendant Viacom International, Inc.'s Motion to Dismiss at 7-9.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 9-10.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 11.

Viacom filed Case 7149 against the Harmonix Shareholders on August 23, 2012.[54] Viacom claimed that the Harmonix Stockholders breached the Merger Agreement.[55] Viacom also requested a declaratory judgment that the Determination of the Resolution Accountants is void and unenforceable due to the Resolution Accountants' fraud or manifest error.[56] The Harmonix Stockholders counterclaimed, contending that Viacom breached the Merger Agreement by failing to pay the amount of the 2007 Earn-Out Payments as set out in the Determination of the Resolution Accountants.[57] The Chancery Court entered judgment for the Harmonix Shareholders and ordered Viacom to pay $298,813,095.00 with interest as 2008 Earn-Out Payments.[58] Viacom appealed this decision to the Delaware Supreme Court.[59] The Supreme Court affirmed the decision on July 16, 2013.[60]

C. MR. WINSHALL'S CLAIMS

Mr. Winshall filed this action on June 14, 2015. The Complaint has four counts.[61] In Count I, Mr. Winshall claims that Viacom breached the Merger Agreement by not proving the 2007 and 2008 Earn-Out Statements within fifteen days of Viacom having all of the information it needed to complete the Statements, by not following the Determination of the Resolution Accountants, and by using Case 7149 for improper purposes of delay.[62] Mr. Winshall seeks indemnification for the losses Mr. Winshall incurred, including attorneys fees and court costs.[63]

---

[54] Verified Civil Complaint ¶ 78.
[55] *Id.*
[56] *Id.* ¶ 79.
[57] *Id.*
[58] *Id.* ¶ 81.
[59] *Id.*
[60] *Id.*
[61] *Id.* ¶ 89-121.
[62] *Id.* ¶¶ 91-94.
[63] *Id.* ¶ 96.

In Count II, Mr. Winshall claims that Viacom breached the Merger Agreement by delaying the 2007 and 2008 Earn-Out Statements, which caused Mr. Winshall and the Harmonix Stockholders damages from the tax consequences of the delay.[64]

In Count III, Mr. Winshall claims that Viacom breached the implied covenant of good faith and fair dealing by failing to act in good faith with regard to the determination and payment of the Earn-Out Payments, which prevented Mr. Winshall and the Harmonix Stockholders from receiving the benefits they bargained for under the Merger Agreement.[65]

In Count IV, Mr. Winshall claims that Viacom acted with malice in filing Case 6873 because its intent was to delay the Earn-Out Payments and to pressure Mr. Winshall to settle. Mr. Winshall seeks damages including the costs and expenses from Case 6873 and damages from the delay of the 2008 Earn-Out Payment.[66]

In Viacom's Motion, Viacom claims that Counts I-IV are barred by the doctrine of *res judicata*.[67] Viacom also contends that the claims asserted in Counts I-IV are time-barred.[68] Finally, Viacom argues that Mr. Winshall fails to state claims for which relief can be granted.[69]

In the Answer, Mr. Winshall contends that this action is not barred by the doctrine of *res judicata* because his claims were not ripe during the previous actions between Viacom and Mr. Winshall.[70] In addition, Mr. Winshall argues that the statute of limitation should be tolled because Viacom fraudulently concealed information Mr. Winshall needed to make his claims.[71] Finally, Mr. Winshall asserts that the Verified Civil Complaint states claims on all of its counts.[72]

---

[64] *Id.* ¶¶ 97-103.
[65] *Id.* ¶¶ 104-111.
[66] *Id.* ¶¶ 112-121.
[67] Opening Brief in Support of Defendant Viacom International, Inc.'s Motion to Dismiss at 14-22.
[68] *Id.* at 22-26.
[69] *Id.* at 26-34.
[70] Plaintiff's Answering Brief in opposition to Defendant's Motion to Dismiss at 26-35.
[71] *Id.* at 36-42.
[72] *Id.* at 9-25.

III. LEGAL STANDARD

Upon a motion to dismiss, the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[73] However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."[74]

IV. DISCUSSION

A. *RES JUDICATA*

The doctrine of *res judicata* "prevent[s] a multiplicity of needless litigation of issues by limiting parties to one fair trial of an issue or cause of action which has been raised or should have been raised in a court of competent jurisdiction."[75] The doctrine of *res judicata* bars a claim when a five-part test set out by the Supreme Court in *Dover Historical Society, Inc. v. City of Dover Planning Commission* is met:

> (1) The original court had jurisdiction over the subject matter and the parties;
> (2) The parties to the original action were the same as those parties, or in privity, in the case at bar;
> (3) The original cause of action or the issues decided was the same as the case at bar;
> (4) The issues in the prior action must have been decided adversely to the appellants in the case at bar; and
> (5) The decree in the prior action was a final decree.[76]

In *Dover Historical Society*, the Supreme Court held that the doctrine of *res judicata* did not bar the appellants' second action seeking attorneys' fees because the second action rested upon facts

---

[73] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, No. 09C-09-136, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).
[74] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).
[75] *LaPoint v. Amerisource Bergen Corp.*, 970 A.2d 185, 192 (Del. 2009).
[76] *Dover Historical Soc., Inc. v. City of Dover Planning Commission*, 902 A.2d 1084, 1092 (Del. 2006).

that did not arise until the first action seeking attorneys' fees had been denied.[77] Therefore, because there was a different legal theory that was unavailable earlier, the doctrine of *res judicata* did not bar the claim.[78] Similarly, in *LaPoint v. AmerisourceBergen Corp.*, the Supreme Court held that the doctrine of *res judicata* did not bar the claim because the duty at issue in the second claim did not arise until after the first claim had been completed.[79]

The Supreme Court set out the doctrine of *res judicata*'s elements similarly in an earlier case, *Kossol v. Ashton Condominium Association*:

> When a defendant claims that the doctrine of *res judicata* bars the subsequent action, he or she must show that the elements of *res judicata* exist. First, the same transaction must form the basis for the prior and subsequent suits. Second, the plaintiff must have neglected or failed to assert claims which in fairness should have been asserted in the first action . . . . Upon such a showing, the plaintiff, to prevent dismissal, must then show that there was some impediment to the presentation of the entire claim for relief in the prior forum.[80]

In *Kossol*, the Supreme Court explained that the doctrine of *res judicata* bars litigation between the same parties when the claims in the later litigation arise from the same transaction that was the basis of the original litigation – *i.e.*, the transactional approach to the doctrine of *res judicata*.[81] Therefore, even if the theory in the later action is different, the claim is still barred if it comes from the same transaction.[82]

In *RBC Capital Markets, LLC v. Education Loan Trust IV*, the Supreme Court held that it is not "invariably true" that two claims involving the same contract come from the same transaction.[83] "A subsequent breach of contract claim will not be treated as identical to an earlier contract claim (and therefore res judicata will not operate as a bar) where the facts underlying the

[77] *Id.*
[78] *Id.*
[79] *LaPoint*, 970 A.2d at 195, 187.
[80] *Kossol v. Ashton Condo. Assoc.*, 637 A.2d 827 (Del. 1994) (citations omitted).
[81] *Id.*
[82] *Id.*
[83] *RBC Capital Markets, LLC v. Education Loan Trust IV*, 87 A.3d 632, 645 (Del. 2014).

later claim were either unknown or incapable of being known at the time of the earlier action."[84] In *RBC Capital Markets*, the Supreme Court overturned the Superior Court's dismissal of a breach of contract claim.[85] The Superior Court had held that the breach of contract claim before it was identical to a Chancery Court breach of contract claim because the claims arose from the same transaction – the contract.[86] The Supreme Court noted that it was possible that the claimers *were* identical, but it was too early to determine based on the record under the Civil Rule 12(b)(6) standard.[87] The Supreme Court further noted that it was "clear, if only from the parties' need to resort to extrinsic evidence, that any determinations of what [the plaintiff] knew or could have known at the time of the Chancery litigation require[d] a factual inquiry that is inappropriate at this procedural stage."[88] The Court finds the holding and reasoning in *Kossol* and *RBC Capital Markets* to be helpful in this case.

Here, Viacom argues that the contract claims (Counts I-III) are barred by the doctrine of *res judicata* because Mr. Winshall could have or did bring those claims in the Chancery Court Actions. Viacom also argues that the malicious prosecution claim (Count IV) is barred by the doctrine of *res judicata* because Mr. Winshall should have raised it in Case 6874 or Case 7149. According to Viacom, Mr. Winshall did not learn any new facts after the Chancery Court made its decisions in those cases.

The *Kossol* test applies to the facts of this case better than the *Dover Historical Society* test because the Court must decide whether Mr. Winshall should have raised the claims in this action during the Chancery Court Actions. First, it is established that the Chancery Court Actions and this action arose from the same transaction — the 2007 and 2008 Earn-Out

---

[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 645-46.
[88] *Id.* at 646.

Payments under the Merger Agreement. Second, Viacom needs to show that Mr. Winshall should have included Counts I-IV in the Chancery Court Actions. Once that is shown, Mr. Winshall needs to show that there was an impediment stopping him from bringing the claim in the earlier actions.

1. Count I

Count I is a claim for indemnification based on the argument that Viacom breached the Merger Agreement by not completing the 2007 and 2008 Earn-Out Statements within 15 days of having the information Viacom needed. This claim is very close to those in the Chancery Court Actions. However, Mr. Winshall alleges that he could not have brought this claim earlier because Viacom fraudulently misled him when Viacom told Mr. Winshall that Viacom did not have the information it needed to complete the Earn-Out Statements. Viacom disputes this in its Motion to Dismiss and uses extrinsic evidence — its SEC filings — to support its argument.[89] Like the parties in *RBC Capital Markets*, Mr. Winshall and Viacom dispute facts: what Viacom knew, whether Viacom was able to prepare the Earn-Out Statements, and when Mr. Winshall found out that Viacom was able to prepare the Earn-Out Statements. Like the defendant in *RBC Capital Markets*, Viacom relies on extrinsic evidence in a motion to dismiss. The Court finds that is premature for the Court to dismiss Count I under the 12(b)(6) standard.

Further, Mr. Winshall could not have brought Count I earlier under Delaware law. In *LaPoint v. Amerisource Bergen Corp.*, the Supreme Court held that when a merger agreement unambiguously provides for indemnification for beaches of the merger agreement, an

[89] The Delaware Supreme Court has held that a court may look at public filings in a 12(b)(6) motion to dismiss in two circumstances: (1) when a document is integral to a plaintiff's claim and is incorporated into the complaint and (2) when a document is not being relied upon to prove the truth of its contents. *Vanderbilt Income and Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995). In this case, at this stage, it does not appear that Viacom is using the SEC filings for either purpose.

indemnification claim does not accrue until after there is a successful breach of contract claim.[90] Applying *LaPoint* to this case means that the indemnification claim was not ripe until Mr. Winshall won a breach of contract claim in the Chancery Court Actions. In one of the Chancery Court Actions, the Supreme Court interpreted the Merger Agreement's indemnification clause.[91] The Supreme Court wrote: "The plain language of the Merger Agreement conditions indemnification upon the existence of a breach of a representation or warranty in the Agreement."[92] The Supreme Court found that there was no indemnification because there was no explicit duty to defend and there was no breach of contractual representations and warranties.[93] Here, in contrast, we already know there was a breach of the Merger Agreement because the Chancery Court determined it in Case 7149, which the Supreme Court affirmed. Therefore, at this stage of the proceedings, the doctrine of *res judicata* does not appear to bar Count I.

2. Count II

Count II is a claim for damages, including tax consequences and lost interest, caused by the delay in obtaining the 2007 and 2008 Earn-Out Statements. Like Count I, Count II asserts a claim that is very close in nature to those asserted in the Chancery Court Actions. Mr. Winshall alleges that he relied on Viacom's representations that the Earn-Out Statements were delayed while Viacom waited for information and that Mr. Winshall was not able to review related Viacom documents. As a result, Mr. Winshall could not bring claims involving the delay of the Earn-Out Statements during the Chancery Court Actions. Viacom uses its SEC filings to dispute that Viacom made misrepresentations about the delay. Like Count I, this claim is similar to the

[90] *LaPoint*, 970 A.2d at 197-98.
[91] *Winshall v. Viacom Inter'l, Inc.*, 76 A.3d 808 (Del. 2013).
[92] *Id.* at 819.
[93] *Id.* at 819-21.

claim in *RBC Capital Markets*. It arises from the same transaction as the claims in the Chancery Court Actions, but Mr. Winshall alleges that the claim is based on information that was not known to Mr. Winshall during the earlier actions. There are questions of fact. Viacom seeks to use extrinsic evidence to support the Motion. Therefore, as in *RBC Capital Markets*, it is premature for the Court to dismiss Count II.

3. Count III

Count III is a claim for damages, including tax consequences and lost interest, caused by Viacom's purported breach of the implied covenant of good faith and fair dealing regarding the Earn-Out Statements and the determination of the Earn-Out Payments. This claim is also very close to one asserted in the Chancery Court Actions. The difference, however, is that Mr. Winshall now alleges that Viacom fraudulently hid information from him, which is a fact at issue in this case. Viacom disputes the allegations and uses its SEC filings to show that Viacom did not make misrepresentations. As discussed in the preceding sections, the facts of this case are close to those in *RBC Capital Markets*. The Court will follow that case's analysis, so the Court finds that it is premature to dismiss Count III.

4. Count IV

Count IV is a malicious prosecution claim. The elements of a malicious prosecution claim are: "1) the institution of civil proceedings; 2) without probable cause; 3) with malice; 4) termination of the proceedings in the aggrieved party's favor; and 5) damages which were inflicted upon the aggrieved party by seizure of property or other special injury."[94] Because one of the elements is that the proceedings were terminated in favor of the aggrieved party, Mr. Winshall could not bring this claim until he won Case 6874. Therefore, this claim is not barred by the doctrine of *res judicata*. The Court will note, however, that this cause of action is viewed

[94] *Carr v. Dewey Beach*, 730 F. Supp. 591, 598 (Del. 1990).

with disfavor by the Delaware Courts and will be evaluated with careful scrutiny as this civil action progresses.[95]

B. STATUTE OF LIMITATIONS

There is a three-year statute of limitations for contract claims.[96] The limitations period starts to run when the cause of action accrues.[97] A court may toll the statute of limitations in certain circumstances: "(1) inherently unknowable injuries; (2) fraudulent concealment; and (3) equitable tolling."[98] The plaintiff must plead with specificity its reasons for why the court should toll the statute of limitations.[99] The court may toll the statute of limitations if a defendant fraudulently concealed facts that would have put the plaintiff on notice through "an affirmative act of concealment or 'actual artifice.'"[100]

Here, Counts I, II, and III arise from the Merger Agreement, so the three-year statute of limitations applies. Mr. Winshall argues that the Court should toll the statute of limitations because Viacom fraudulently concealed that Viacom had the information it needed to complete the 2007 and 2008 Earn-Out Statements. Viacom argues that Winshall does not state in his Complaint that he learned anything after March 9, 2010, therefore Mr. Winshall failed to specifically show that the statute of limitations was tolled any later than March 9, 2010.

Given the complicated facts and timeline in this case and given that Mr. Winshall is arguing that Viacom committed fraud, it is premature for the Court to dismiss Counts I, II, and III before discovery has taken place. Discovery should clarify whether there is genuine issue as

---

[95] *See, e.g.*, *Nix v. Sawyer*, 466 A.2d 407, 411 (Del. Super. 1983)(citations omitted).
[96] 10 Del. C. § 8106.
[97] *SmithKline Beecham Pharmaceuticals Co. v. Marck & Co.*, 766 A.2d 442, 450 (Del. 2000).
[98] *In re Dean Witter P'ship Litigation*, C.A. No. 14816, 1998 WL 442456, at *5-6 (Del. Ch. July 17, 1998).
[99] *Young & McPherson Funeral Home, Inc. v. Butler's Home Improvement, LLC*, C.A. No. N14C-08-234 JRJ, 2015 WL 4656486, at *1 (Del. Super. Aug. 6, 2015); *Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, C.A. No. 8075-VCG, 2013 WL 6186326, at *11 (Del. Ch. Nov. 27, 2013).
[100] *Eni Holdings*, 2013 WL 6186326, at *12 (quoting *In re Dean Witter P'ship Litigation*, 1998 WL 442456, at *5).

to a material fact on whether the statute of limitations acts as a bar to Counts I-III and, therefore, this issue could be revisited on a motion for summary judgment.

For example, the Court may find that Count II should not be tolled because Mr. Winshall would have been on notice of the tax consequences caused by Viacom's delayed payments, regardless of any fraud. The Court also notes that, regarding Count III, *LaPoint* states that an indemnification claim does not accrue until after the underlying issue is decided. Because the Supreme Court ruled on the final case in the Chancery Court Actions in July 2013 and this action was filed in June 2015, this Court may find that Count III is timely.

Mr. Winshall alternatively argues that the Doctrine of Continuous Contract and Continuous Breach tolled the statute of limitations. That doctrine states that the statute of limitations begins to run in a case with a continuous contract and a continuing breach when full damages are ascertained and recovered.[101] Whether there was a duty or a continuing breach are questions of fact based on the parties' intent, so it would be improper for the Court to decide these issues on a motion under Civil Rule 12(b)(6).[102]

C. FAILURE TO STATE A CLAIM

1. Count I

In Count I, Mr. Winshall claims that Viacom must indemnify Mr. Winshall for the "Losses" he suffered (attorneys' fees, court costs, etc.) because Viacom breached the Merger Agreement. Section 8.6(a) states that Viacom must indemnify Mr. Winshall for "all Losses actually incurred . . . as a result of: (i) the breach of any representative or warranty of [Viacom] .

[101] *Smith v. Mattia*, C.A. No. 4498-VCN, 2010 WL 412030, at *4 (Del. Ch. 2010).
[102] *Id.*

. . set forth in this Agreement . . . and . . . (ii) the breach of any covenant or agreement of [Viacom] . . . contained in this Agreement."[103]

Because the Merger Agreement provides for indemnification for a breach of contract, Mr. Winshall needed to plead enough facts showing a breach of contract to survive a motion to dismiss. Mr. Winshall alleges that Viacom breached the Merger Agreement by failing to provide the Earn-Out Statements within fifteen days of having the information it needed to complete them, by failing to abide by the Determination of the Resolution Accountants as a final and binding document, and by challenging the Determination of the Resolution Accountants — despite knowing that there was no fraud or manifest error — to delay the Earn-Out Payments. Therefore, Mr. Winshall has plead sufficient facts to survive a motion to dismiss for Count I.

Viacom argues that Section 8.6(b) of the Merger Agreement limits the obligation to indemnify Mr. Winshall: "[Viacom] shall not be obligated to indemnify any [Harmonix Stockholder] pursuant to Section 8.6(a) to the extent the aggregate amount of all indemnifiable Losses exceeds the aggregate unpaid amount of the Merger Consideration then payable."[104] Viacom argues that it has no indemnification obligation after Viacom already paid the unpaid amount of the Merger Consideration. This may or may not be true. Another very likely interpretation is that the "unpaid amount of the Merger Consideration then payable" is the amount payable when the underlying claim was resolved by the Court of Chancery and Supreme Court. If Viacom develops the record as it believes it can, Viacom can demonstrate that the facts support its conclusion that Viacom already paid the unpaid amount of the Merger Consideration and no breach has occurred.

[103] Merger Agreement, § 8.6.
[104] *Id.* § 8.6(b).

2. Count II

In Count II, Mr. Winshall claims that Viacom breached the Merger Agreement by delaying the Earn-Out Statements. Section 2.4 of the Merger Agreement provides that Viacom will prepare the Earn-Out Statements within fifteen days of when Viacom has the information it needs to prepare the statements and must provide the Harmonix Stockholders with "reasonable access to work papers and supporting documentations relating to the [Earn-Out Statements] and such other documentation in each case as [Plaintiff] may reasonably request in order to assess the accuracy of the [Earn-Out Statements]."[105]

Mr. Winshall alleges that Viacom delayed preparing the 2007 and 2008 Earn-Out Statements until January 2010 and March 2010, respectively, which was after the time when Viacom had the information it needed to prepare the Earn-Out Statements. Mr. Winshall also claims that Viacom failed to give Mr. Winshall documents related to the Earn-Out Statements. If true, these could be violations of the Merger Agreement. Regarding the damages, Mr. Winshall alleges that Viacom's delay of the Earn-Out Statements caused damages including tax consequences. Therefore, Mr. Winshall has plead sufficient facts for Count II to survive a motion to dismiss.

3. Count III

In Count III, Mr. Winshall alleges that Viacom breached the implied covenant of good faith and fair dealing. Under Delaware law, every contract has an implied covenant of good faith

[105] *Id.* § 2.4.

and fair dealing.[106] Good faith is everything that is not bad faith.[107] A party should not behave arbitrarily or unreasonably and frustrate the "overarching purpose" of the contract.[108]

Here, Mr. Winshall asserts factual allegations that Viacom acted in bad faith by not timely compiling the information for the Earn-Out Statements, by not timely providing the Earn-Out Statements, by delaying the appointment of the Resolution Accountants, by filing claims for repayment of the Preliminary 2007 Earn-Out Payment while the Resolution Accountants were still reviewing the matter, by challenging the Determination of the Resolution Accountants, and by delaying the 2007 and 2008 Earn-Out Payments. Mr. Winshall goes on to contend that this behavior prevented the Harmonix Stockholders from receiving the full benefits of the Merger Agreement and caused other economic damages.

In addition, Mr. Winshall claims that Viacom acted in bad faith by adjusting the preliminary 2007 Earn-Out Statement after making a Preliminary 2007 Earn-Out Payment and claiming the money had to be repaid. Mr. Winshall contends that Viacom acted in bad faith by failing to make the process of preparing the Earn-Out Statements transparent and by refusing to give Mr. Winshall relevant documents. Mr. Winshall alleges that these actions led to damages including tax consequences. Therefore, at this stage of the proceedings, Mr. Winshall has plead sufficient facts for Count III to survive a motion to dismiss.

4. Count IV

In Count IV, Mr. Winshall claims Viacom maliciously prosecuted Mr. Winshall in the 6874 Action. The elements of a malicious prosecution claim are: "1) the institution of civil proceedings; 2) without probable cause; 3) with malice; 4) termination of the proceedings in the

[106] *Dunlap v. State Farm Fire and Casualty Co.*, 878 A.2d 434, 440-442 (Del. 2005).
[107] *Id.* at 441 (Despite its evolution, the term "good faith" has no set meaning, serving only to "exclude a wide range of heterogeneous forms of bad faith.") (citation omitted).
[108] *Id.* at 442.

aggrieved party's favor; and 5) damages which were inflicted upon the aggrieved party by seizure of property or other special injury."[109] For damages, the Superior Court had held that there must be "something more than expenses and attorneys fees incurred in connection with defending the counterclaims."[110]

For the first element, Mr. Winshall alleges that Viacom filed Case 6874 in the Court of Chancery. For the second element, Mr. Winshall alleges that Viacom had no probable cause to bring suit to make the Harmonix Stockholders return the Preliminary 2007 Earn-Out Payment. Mr. Winshall reasons that Viacom lacked probable cause because the Resolution Accountants were supposed to resolve disputes over the Earn-Out Payments under to the Merger Agreement.[111] Viacom alleges that it was trying to preserve its rights to the Preliminary 2007 Earn-Out Payment.

For the third element, Mr. Winshall alleges that Viacom acted with malice because Viacom actually tried to delay the Earn-Out Payments and to pressure Mr. Winshall to settle for Viacom's own benefit. For the fourth element, Mr. Winshall states that the Chancery Court found for Mr. Winshall in Case 6874. For the fifth element, Mr. Winshall states that the Harmonix Stockholders suffered damages including defense expenses and other damages from the delayed 2007 Earn-Out Payments. Mr. Winshall did plead all of the elements of the claim, even if there are lingering questions of fact. Regardless of the strength of this claim, Mr. Winshall has plead sufficient facts for Count IV to survive a motion to dismiss.

---

[109] *Carr v. Dewey Beach*, 730 F. Supp. 591, 598 (Del. 1990).
[110] *Nevins v. Bryan*, No. 05C-07-041-ESB, 2005 WL 2249520, at *6 (Del. Super. 2005).
[111] Merger Agreement § 2.4(c).

V. CONCLUSION

For the foregoing reasons Defendant Viacom International, Inc.'s Motion to Dismiss is **DENIED.**

IT IS SO ORDERED.

Dated: February 29, 2016
Wilmington, Delaware

/s/ *Eric M. Davis*
Eric M. Davis, Judge